

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ROGER LEE WARREN,

Petitioner,

v.

JON LITSCHER, GERALD BERGE,
JANET WALSH, TWILA HAGAN,
COLLETTE CULLEN and UNKNOWN
INDIVIDUALS 1-10,

Respondents.

ORDER

02-C-0093-C

This is a proposed civil action for monetary relief, brought pursuant to 42 U.S.C. § 1983. Petitioner, who is presently confined at the Columbia Correctional Institution in Portage, Wisconsin, seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the full fees and costs of instituting this lawsuit and has no assets or means with which to pay the initial partial filing fee required by 28 U.S.C. § 1915(b)(1). Accordingly, I will review petitioner's request for leave to proceed in forma pauperis without

first requiring payment of an initial partial filing fee. 28 U.S.C. § 1915(b)(4).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, if the litigant is a prisoner, the 1996 Prison Litigation Reform Act requires the court to deny leave to proceed if the prisoner has on three or more previous occasions had a suit dismissed for lack of legal merit (except under specific circumstances that do not exist here), or if the prisoner's complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief. Although this court will not dismiss petitioner's case sua sponte for lack of administrative exhaustion, if respondents can prove that petitioner has not exhausted the remedies available to him as required by § 1997e(a), they may allege his lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). See Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); see also Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999).

In his complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner Roger Lee Warren is a Wisconsin prisoner presently confined at the Columbia Correctional Institution in Portage, Wisconsin. Respondent Jon Litscher is

Secretary of the Department of Corrections. Respondent Gerald Berge is the warden at Supermax Correctional Institution, where respondents Cullen and Hagan are psychologists. Respondent Walsh is a psychologist at Columbia Correctional Institution. “Unknown Individuals 1-10” are John and Jane Doe respondents.

On December 14, 1999, petitioner was transferred from Columbia Correctional Institution to Supermax Correctional Institution. Petitioner was not examined by a psychiatrist prior to his transfer to Supermax, nor was he evaluated using the Supermax mental health screening tool even though his clinical file contained evidence that he suffered from a mental illness. At the time of his transfer, petitioner’s clinical file contained a range of diagnoses, including major depression, bipolar disorder, borderline personality disorder and severe mood swings. These diagnoses had been part of petitioner’s clinical file since the beginning of his incarceration and were also included in his presentence report and in various psychiatric hospital files. All of these reports indicate that petitioner has suffered from mental illness as a child and an adult. Respondent Walsh knew of these diagnoses, but nevertheless approved petitioner’s transfer to Supermax.

On March 7, 2000, respondent Hagan filed a Supermax clinical services brief diagnostic summary of petitioner’s condition. In this summary, respondent Hagan stated that on Axis II diagnoses petitioner had a diagnosis of antisocial personality with borderline features. In addition, she wrote that petitioner had no recorded history of placement in

observation status and no history of transfer to the Wisconsin Resource Center or the special management unit. This was not true. Respondent Hagan falsified the report to make it look as if petitioner had not had any problems in the past. Petitioner's clinical file, which was in respondent Hagan's possession, states that petitioner was placed in observation at DCI and that he was placed in the special management unit at DCI (petitioner does not further identify "DCI," but he may be referring to Dodge Correctional Institution). Even though respondent Hagan knew about all of this and about petitioner's borderline personality disorder diagnosis, she still kept petitioner at Supermax and provided him clinical counseling only rarely.

After petitioner had been at Supermax for ten months and two days, respondent Walsh evaluated petitioner using the mental health screening tool. Respondent Walsh answered "yes" to the question whether petitioner has a documented history of chronic or severe mental illness, and listed the following diagnoses: ADHD, bipolar NOS, depression and personality disorder with antisocial and borderline features. Respondent Walsh answered "no" to the question whether petitioner had been hospitalized due to his mental illness. Respondent Walsh was not truthful in answering all of the screening tool's questions, including question five, in answer to which respondent Walsh asserted that all treatment options had been exhausted for petitioner, including inpatient treatment at the Wisconsin Resource Center and involuntary treatment with medication. Even though

respondents Walsh and Hagan knew at this point that it was improper for petitioner to be housed at Supermax, they did not remove him, thereby risking the exacerbation of his mental disorders.

While incarcerated at Supermax in 2001, petitioner was again diagnosed as having borderline personality disorder by respondent Cullen. Although in respondent Cullen's opinion petitioner did not belong at Supermax, she failed to have petitioner removed from Supermax for several months after the diagnosis was made.

At Supermax, petitioner was subjected to 24 hour illumination, sensory deprivation, temperature fluctuations and had little or no human contact. This caused petitioner a great deal of stress that in turn resulted in frequent demotions within the prison's level system during the 23 months and seven days he was incarcerated there. Petitioner wrote several letters asking that his mental illness be treated, but because he had limited contact with respondent Cullen he did not receive proper treatment. Two biweekly half hour therapy sessions with respondent Cullen were not sufficient to treat petitioner's emotional disorders. Petitioner suffered frequently from severe headaches at Supermax and was unable to urinate on his own, resulting in the need for frequent catheterizations. The lack of medical care intensified petitioner's mental disorders and resulted in his being placed on observation status on several occasions. Petitioner frequently received little or no psychological or psychiatric counseling and when he did it was for only minutes at a time. Because petitioner

experienced almost constant isolation, he lost touch with reality at times and always had a sense of hopelessness that intensified his mental disorders.

In June 2001, petitioner was placed on observation status. When respondent Cullen came to see petitioner, she repeatedly asked petitioner to trust her and to let her help him. Approximately one day later, respondent Cullen returned to the observation cell and told petitioner she would not see him until he reached level two. Respondent Cullen refused to provide petitioner psychological treatment while he was on level one.

All respondents knew that petitioner suffered from a borderline personality disorder and a bipolar disorder. Even though it was determined on October 17, 2000, that petitioner did not fit the criteria for transfer to Supermax because of his mental condition, he was kept at Supermax for another 13 months.

Respondent Litscher did not properly train the other respondents in filling out the Supermax mental illness screening tool and in recognizing that petitioner suffered from a serious mental illness.

OPINION

I understand petitioner to allege that respondents violated his rights under the Eighth Amendment by subjecting him to cruel and unusual conditions of confinement and by failing to provide him with adequate mental health care.

A. Conditions of Confinement

Petitioner alleges that he was approved for transfer to Supermax despite his history of mental illness and that once at Supermax he was subjected to 24 hour illumination, extreme isolation, sensory deprivation and temperature fluctuations that exacerbated his mental illness and caused him to have severe headaches and to be demoted frequently within the prison's level system. In order to state a claim under the Eighth Amendment, petitioner's allegations about prison conditions must satisfy a test that involves both an objective and subjective component. Farmer v. Brennan, 511 U.S. 825, 834 (1994). He must show that the conditions to which he was subjected were "sufficiently serious" (objective component) and that defendants were deliberately indifferent to his health or safety (subjective component). Id. Under some circumstances, it is possible for a combination of physical conditions of confinement to violate the Eighth Amendment when viewed in their totality, even if each condition alone would not. See Wilson v. Seiter, 501 U.S. 294, 304 (1991).

Conditions of confinement that deprive prisoners of the "minimal civilized measure of life's necessities" satisfy the objective component of the Eighth Amendment inquiry. Farmer, 511 U.S. at 834 (citations omitted). The Eighth Amendment protects individuals against both harm that is occurring and against "conditions posing a substantial risk of serious harm" if allowed to continue. Id. It is well settled that the Eighth Amendment

protects the mental health of prisoners no less than their physical health. See, e.g., Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987); Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983). “If the particular conditions of [confinement] being challenged are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then defendants have deprived inmates of a basic necessity of human existence - indeed, they have crossed into the realm of psychological torture.” Madrid v. Gomez, 889 F. Supp. 1146, 1264 (N.D. Cal. 1995).

As for the subjective component of the Eighth Amendment test, the Supreme Court has held that deliberate indifference requires that “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” Farmer, 511 U.S. at 837. If the circumstances suggest that the prison officials were exposed to information about the risk and thus must have known about it, that evidence could be sufficient to allow a trier of fact to find actual knowledge. Id. at 842-43. The officials can still show that they were unaware of the risk or that they were aware of the risk and took reasonable steps to prevent the risk of harm. Id. at 844-45.

Construing petitioner’s complaint liberally, as I must, he alleges that he was sent to Supermax despite the fact that he suffered from a variety of mental disorders and that once there, he was subjected to sensory deprivation, near total isolation and 24-hour illumination

and wild temperature fluctuations in his cell. According to petitioner, these conditions prevented him from advancing through the prison's level system, caused him to lose touch with reality, exacerbated his mental health problems, induced severe headaches and brought on other health related problems. Further, petitioner alleges that respondent Walsh approved his transfer to Supermax even though she was aware at the time of the transfer that petitioner had been diagnosed with a host of mental disorders. Petitioner also alleges that respondents Walsh, Hagan and Cullen all evaluated his mental health at various points during his stay at Supermax and although they were aware that he suffered from mental disorders that made his placement at Supermax inappropriate, they failed to have him transferred to a suitable facility. Finally, I read petitioner's complaint to allege that respondents Litscher and Berge were aware of and condoned the practice of incarcerating inmates like plaintiff who suffer from serious mental illnesses at Supermax. At this early stage of the proceedings, these allegations are sufficient to state a claim that respondents Litscher, Berge, Walsh, Hagan and Cullen were deliberately indifferent to petitioner's health and safety in violation of the Eighth Amendment. Accordingly, petitioner will be granted leave to proceed against these respondents on this claim. Petitioner will be denied leave to proceed against "Unknown Individuals 1-10" because his complaint contains no specific allegations involving any individual whose identity is unknown to petitioner.

B. Inadequate Mental Health Care

Petitioner alleges that he received inadequate treatment for his mental disorders while he was incarcerated at Supermax. The Eighth Amendment requires the government “to provide medical care for those whom it is punishing by incarceration.” Snipes v. Detella, 95 F.3d 586, 590 (7th Cir. 1996) (quoting Estelle v. Gamble, 429 U.S. 97, 103 (1976)). To state a claim of cruel and unusual punishment, “a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.” Estelle, 429 U.S. at 106. Therefore, petitioner must allege facts from which it can be inferred that he had a serious medical need (objective component) and that respondent was deliberately indifferent to this need (subjective component). Estelle, 429 U.S. at 104; see also Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). Attempting to define “serious medical needs,” the Court of Appeals for the Seventh Circuit has held that they encompass not only conditions that are life-threatening or that carry risks of permanent, serious impairment if left untreated, but also those in which the deliberately indifferent withholding of medical care results in needless pain and suffering. Gutierrez, 111 F.3d at 1371. Petitioner has alleged that he suffers from a variety of mental disorders including major depression, bipolar disorder, borderline personality disorder and severe mood swings and that his disorders were exacerbated by his incarceration at Supermax. These allegations are sufficient to suggest that petitioner has serious medical needs.

The Supreme Court has held that the subjective component of deliberate indifference requires that “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” Farmer, 511 U.S. at 837. It is not enough that he "should have known" of the risk. Rather, the official must know there is a risk and consciously disregard it. Higgins v. Correctional Medical Services of Illinois, 178 F.3d 508, 511 (7th Cir. 1999). Although deliberate indifference may be found where "the medical treatment is 'so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition,'" Snipes, 95 F.3d at 592 (citations omitted), inadvertent error, negligence, gross negligence or even ordinary malpractice are insufficient grounds for invoking the Eighth Amendment. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996). “[D]ifferences in opinion between the patient and the doctor [regarding medical treatment] never give rise to a constitutional claim.” Higgins v. Correctional Medical Services of Illinois, Inc., 8 F. Supp 2d. 821, 830 (N.D. Ill. 1998).

It is not clear from petitioner’s proposed complaint how often he received treatment for his mental disorders while at Supermax. Petitioner alleges that at one point he was having two biweekly half hour therapy sessions with respondent Cullen. Petitioner believes these were not sufficient to treat his emotional disorders. This allegation by itself is insufficient to state a claim for deliberate indifference. However, petitioner alleges that he

frequently received little or no psychological or psychiatric counseling and that when counseling was provided it was for only minutes at a time. At this early stage of the proceedings, these allegations regarding the general unavailability of mental health treatment at Supermax are sufficient to state a claim for deliberate indifference. Petitioner will be granted leave to proceed against respondents Litscher and Berge on this aspect of his deliberate indifference claim because the allegations involve the practices or policies of the Department of Corrections as applied at the Supermax prison, for which respondents Litscher and Berge are responsible. Finally, petitioner alleges that respondent Cullen refused to provide him psychological treatment while he was on level one of the prison's behavior modification system and would treat him only when he reached level two. This is sufficient to state a claim that respondent Cullen was deliberately indifferent to petitioner's serious medical needs while he was on level one and accordingly petitioner will be granted leave to proceed against respondent Cullen on this claim.

ORDER

IT IS ORDERED that

1. Petitioner Roger Lee Warren's request for leave to proceed in forma pauperis on his claim that respondents Litscher, Berge, Walsh, Hagan and Cullen were deliberately indifferent to his health and safety in subjecting him to cruel and unusual conditions of

confinement in violation of the Eighth Amendment is GRANTED;

2. Petitioner Warren's request for leave to proceed in forma pauperis on his Eighth Amendment claims that respondents Litscher and Berge were deliberately indifferent to his serious medical needs by failing to make available adequate mental health treatment at Supermax and that respondent Cullen was deliberately indifferent to his serious medical needs by refusing to treat his mental disorders while he was on level one is GRANTED;

3. Petitioner Warren's request for leave to proceed in forma pauperis against "Unknown Individuals 1-10" is DENIED;

3. Petitioner should be aware of the requirement that he send respondents a copy of every paper or document that he files with the court. Once petitioner has learned the identity of the lawyers who will be representing respondents, he should serve the lawyers directly rather than respondents. Petitioner should retain a copy of all documents for his own files. If petitioner does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents. The court will disregard any papers or documents submitted by petitioner unless the court's copy shows that a copy has gone to respondents or to respondents' lawyers; and

4. The unpaid balance of petitioner's filing fee is \$150.00; petitioner is obligated to pay this amount in monthly payments as described in 28 U.S.C. § 1915(b)(2) when the

funds become available.

Entered this 22nd day of April, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge